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In The

Supreme Court of the United States

October Term, 1956

No. 725

UNION LEADER CORPORATION,
Petitioner,

v.

WALTER D. McLAUGHLIN,
Respondent.

On Writ of Certiorari to Supreme Court of New Hampshire

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondent makes two points in opposition to granting the writ of certiorari prayed for by the petitioner, which will be replied to seriatim.

I

THE CLAIM OF FEDERAL RIGHTS IS STALE

Respondent argues that the only decision of the Supreme Court of New Hampshire from which a petition for a writ of certiorari would lie was the first decision of that Court on July 8, 1955, and then argues that

> "No writ of ceriorari was sought at that time *for the obvious reason that no Federal right had been claimed, on the basis of which to seek the writ.*" (Resp. Br. 11.) (*Italics ours.*)

After arguing that no Federal right had been claimed by petitioner on the first transfer of the case to the Supreme Court of New Hampshire, respondent then proceeds to argue that petitioner *had raised* the Federal Constitutional questions now involved in the petition for the writ, because rights "specific and more stringent" under the Constitution of New Hampshire had been raised by the petitioner; and that the Supreme Court of New Hampshire had passed upon them in its first decision on July 8, 1955, thereby rendering the Federal Constitutional questions *res judicata*. (Resp. Br. 12, 13.) Respondent's inconsistent positions on this question would seem to reduce his argument to a *reducto ad absurdum*, as by what logic can he contend that no Federal question was presented at the time of the decision of the Supreme Court of New Hampshire on July 8, 1955 on which to base a petition for a writ of certiorari, and at the same time argue that the decision of July 8, 1955 of that Court was the only one from which an application for a writ of certiorari could have been made.

This Court has held repeatedly that before it will consider any question under the Constitution of the United States in a case arising in a State Court such question must be *specifically set out* or *claimed* and *passed upon* by the highest Court of the State. (*Carter* v. *People of State of Illinois*, 67 S. Ct. 216, 329 U. S. 173, 91 L. ed. 172; *Charleston Fed. Sav. & Loan Ass'n* v. *Alderson*, 65 S. Ct. 624, 324 U.S. 182, 89 L. ed. 857, reh. den. 65 S. Ct. 863, 324 U.S. 888, 89 L. ed. 1436; and many other cases cited in U. S. C. A., Title 28, §1257 (3), pp. 189, 190.) It also has been held by this Court that the mere fact that there may be lurking in the record a Federal question, which, if raised below, would have been of a Federal nature, does not warrant the Supreme Court in considering such a question. (*Whitney* v. *People of State of California*, 47 S. Ct. 641, 274 U. S. 357, 71 L. ed. 1095.) And even though the highest Court of the State may have dis-

cussed a Federal question in its decision, still this Court will not review such State Court's decision, unless such Federal question was *duly presented* to and *passed* upon by the highest Court of the State. (*Howard* v. *Flemming*, 24 S. Ct. 49, 191 U. S. 126, 48 L. ed. 121.)

In the petition for the writ we demonstrated that the Federal Constitutional questions were specifically set out and claimed in the trial court before any judgment had ever been entered by the Supreme Court of New Hampshire or by the trial court (Pet. 7, 8); that the Supreme Court of New Hampshire considered the Federal Constitutional questions presented and passed on them on the merits in its decision of November 29, 1956; and that that Court did not raise any objection to the timeliness of questions raised. (Pet. App. 1A, 2A.)

It is respectfully submitted that petitioner's claim as set forth in its petition for a writ of certiorari is not stale by reason of its failure to apply for a writ with respect to the decision of the Supreme Court of New Hampshire dated July 8, 1955; and that petitioner's petition was timely filed after the judgment of the Supreme Court of New Hampshire entered on November 29, 1956, which was the first and only judgment ever entered by that Court. (Pet. 7, 8.)

II

THIS COURT SHOULD NOT UNDERTAKE TO REDETERMINE FACTS FOUND BY THE SUPERIOR COURT OF NEW HAMPSHIRE

Naturally petitioner is not asking this Honorable Court to redetermine facts found by the Superior Court of New Hampshire. All petitioner is asking this Court to do is to grant petitioner a writ of certiorari so that this Court may pass upon the question of whether petitioner was de-

prived of its property without due process of law or denied the equal protection of the laws which are guaranteed petitioner under the Fourteenth Amendment of the Constitution of the United States. If the action of the Superior Court of New Hampshire, which was the trial court, were final and conclusive, as respondent contends, then petitioner's constitutional rights would be determined definitively by that court and not by the Supreme Court of the United States. To state the question would seem to answer it also.

Obviously, the question of whether petitioner had a fair trial is not to be determined by the juror Korcoulis' eleventh hour protestation after the trial that he was not going to use the information which he obtained outside the court room (R. 294), after he had already sworn that he sought it for that very purpose:—

"Well, I thought it would be helpful in order for me to make a decision." (R. 263). Due process requires a fair and impartial jury (Pet. 9), and clearly petitioner did not have one, when Korcoulis went outside the court room on two different occasions confessedly to obtain information which would help him to come to a decision in deciding the case. (R. 263).

Respondent has not cited a single decision of this Court or any other Federal Court in support of his opposition to the granting of the writ.

* * * *

In addition to the cases cited in the petition, petitioner respectfully calls attention to this Court's order in reversing the judgment of the U. S. Court of Appeals for the District of Columbia Circuit and ordering a new trial because of the unintentional intrusion of the F. B. I. into the privacy of the jury. (*Ben Gold* v. *U. S.*, No. 137, rev. 237 F. 2d 764, 775). This case was decided on January 28, 1957, only a day or so before petitioner's petition was filed.

In this case the F. B. I. did not question the jurors regarding the *Gold* case itself, but an entirely different case. This Court held that "The fact that the intrusion was unintentional does not remove the effect of the intrusion."

If the *unintentional* intrusion into the privacy of the jury entitles one to a new trial, is not one *a fortiori* entitled to a new trial where a juror *intentionally* goes outside the court room for the confessed purpose of obtaining information which will help him to come to a decision in the case?

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner.

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PETITION FOR REHEARING

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PETITION FOR REHEARING

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now the petitioner, Union Leader Corporation, by Walter E. Barton and Robert W. Upton, its attorneys of record, and presents this, its petition for rehearing on its petition for a writ of certiorari in the above-entitled cause, which was denied by this Court on March 25, 1957, for the reasons hereinafter stated.

OPINION BELOW

The final judgment of the Supreme Court of New Hampshire is printed in the petition. (Pp. 1, App. A, 3A.)

JURISDICTION

The jurisdiction of this Court is stated in the petition (P. 2), and jurisdiction to entertain petition for rehearing of the Court's order denying the writ is to be found in Rule 58, Par. 2.

QUESTIONS PRESENTED

Whether petitioner was deprived of its property without due process of law or denied the equal protection of the laws within the meaning of Section 1 of the Fourteenth Amendment of the Constitution by the judgment of the Supreme Court of New Hampshire entered on November 23, 1956 in denying petitioner a new trial, where the record showed that one of the jurors, Korcoulis, on two different occasions outside the court room took the prejudiced testimony of a person, not a witness, not under oath, and not subject to cross examination, for the admitted purpose of obtaining information which Korcoulis himself testified "would be helpful in order for me to make a decision." (R. 263, 266; Pet. pp. 3-7.)

REASONS FOR GRANTING REHEARING

I.

Petitioner respectfully submits that it is entitled to a rehearing under Rule 58, Paragraph 2, of this Court, on the following grounds:

1. Circumstances of Substantial Or Controlling Effect Have Intervened.

The petition was not considered or passed upon by a full Court, inasmuch as Mr. Justice Whittaker did not participate in the consideration of the petition or the order denying it. (Clerk's notice of March 28, 1957.)

In *Pollock* v. *Farmers Loan & Trust Company*, 158 U. S. 601, this Court granted a rehearing before the full Court of its decision reported in 157 U. S. 429, which had been considered and decided by only eight of the nine justices due to the illness of Mr. Justice Jackson. In that case a constitutional question was raised, and apparently the Court considered that a party was entitled to have the full Court pass upon a constitutional question. Certiorari was not involved in the *Pollock* case; however, there does not seem to be any sound reason why the same rule should not apply to rehearing on a petition for a writ of certiorari in which a constitutional issue is presented, which is true in the instant case.

2. Substantial Grounds Not Previously Presented Are Available to Petitioner.

In *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U. S. 47, 50, this Court vacated its previous order denying certiorari and entered a new order granting certiorari on a showing that there probably never would be a conflict of decisions in the various Circuit Courts of Appeals on the patent question involved due to the concentration of the automobile industry within the jurisdiction of the Sixth Circuit, which had decided the case below.

It is submitted that unless this Court grants a rehearing in this case, and definitively settles the question, involving as it does the most flagrant misconduct on the part of a juror, the effect will be to leave entirely up to the State Courts the final determination of a party's constitutional right to a fair and impartial jury, contrary of the intent of Congress in granting jurisdiction to this Court in respect of final judgments of the highest Courts of the States on constitutional questions. We make this statement advisedly, as we do not believe that any case is likely to arise in which a party's constitu-

tional right to a fair and impartial jury is more fundamentally violated than in the instant one.

Moreover, if the decision of the Supreme Court of a State is to be final on the question of a party's constitutional rights growing out of the misconduct of the jury, there may be a lack of uniformity of decisions in the various States, and in fact there is already, as the question has been decided differently by the Courts of Texas than it was decided by the Supreme Court of New Hampshire in the present case.

In *Great Western Inv. Co.* v. *Scott*, 254 S. W. 2d 411 and *Burkett* v. *Slawson*, 237 S. W. 2d 253, the Court of Civil Appeals of Texas held that the appellants were entitled to new trials on the ground that the jury had considered evidence not under oath and not subject to cross examination, where the records showed that some of the jurors had discussed their own experiences in the jury room on matters involved in the litigation.

It is submitted that the juror, Korcoulis, going outside the court room to obtain information from a person not a witness, not under oath, and not subject to cross examination, was a greater violation of petitioner's constitutional right to a fair and impartial jury than the action of jurors in the Texas cases in discussing their own experiences in the jury room.

3. The Decision of The Supreme Court of New Hampshire Is Contrary to The Decisions of This Court in Civil Cases.

In *Thiel* v. *Southern Pacific R. R. Co.*, 66 S. Ct. 984, 985, 328 U. S. 217, 220, 90 L. ed. 1181, 1184 and *Railroad Comm. of California* v. *Pacific G. E. Co.*, 58 S. Ct. 334, 338, 302 U. S. 388, 393, 82 L. ed. 319, 322, this Court held that the Fourteenth Amendment applies to civil cases, and in *Market Street Ry. Company* v. *Comm.*, 65

S. Ct. 770, 777, 324 U. S. 548, 562, 89 L. ed. 1171, 1182, it was held that due process requires "that commissions proceed upon matters in evidence and that parties have opportunity to subject evidence to the test of cross examination and rebuttal."

In the instant case, the jury did not proceed upon matters in evidence and petitioner did not have the opportunity of cross examination and rebuttal, in that one of the jurors, Korcoulis, on two different occasions obtained information from a person outside the court room, not a witness, not under oath, and not subject to cross examination, for the *express purpose* of helping the juror to come to a decision as to his verdict in the case.

Petitioner respectfully renews the reasons set out in its petition for the granting of the writ. (Pp. 9-12.)

PRAYER

WHEREFORE, petitioner respectfully prays that its petition for rehearing herein may be granted; and that upon reconsideration, this Honorable Court may vacate its order entered herein on March 25, 1957 and enter a new order granting the petition for a writ of certiorari in this cause.

Respectfully submitted,

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Counsel for Petitioner.

CERTIFICATE OF COUNSEL

The undersigned, one of the counsel for the petitioner herein, hereby certifies that the foregoing petition for rehearing is presented in good faith and not for delay and that it is restricted to the grounds specified in Rule 58, Paragraph 2, of the Rules of this Court, as he verily believes.

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Dated April 5, 1957,
Washington, D. C.